



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

AEG
Docket No. 2374-99
24 March 2000

Mr. [REDACTED]

Dear Mr. [REDACTED]

This is in reference to your application for correction of your naval record pursuant to the provisions of title 10, United States Code, section 1552.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 21 March 2000. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary evidence considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record and applicable statutes, regulations and policies. In addition, the Board considered the affidavit of 16 August 1999 from the Technical Director, Navy Drug Screening Laboratory (NDSL), San Diego, CA; the sworn statement of 30 August 1999 from your military defense counsel; and the advisory opinions of 24 November 1999 and 5 January 2000 from the Military Law Branch and the Separation and Retirement Branch, Headquarters Marine Corps. Copies of the foregoing are attached.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice. In this regard, the Board substantially concurred with the comments contained in the affidavit, sworn statement and advisory opinions.

The Board found that you enlisted in the Marine Corps on 5 August 1996 for four years at which time you acknowledged the Marine Corps policy on illegal use of drugs. Upon completion of training, you were assigned to the Headquarters and Service Battalion, Marine Corps Recruit Depot (MCRD), San Diego, CA. Subsequently, you were advanced in due course to lance corporal (E-3) and although you earned excellent conduct and proficiency marks, you also received an administrative remarks (page 11) entry on 3 October 1997 for underage drinking and failure to go to your place of duty at the prescribed time.

On 23 December 1997 your noncommissioned officer-in-charge (NCOIC), a Staff Sergeant (SSGT; E-6) C, directed you to report to the local substance abuse counseling center (SACO) due to her

suspicion that you were using drugs. The medical record entry documenting your visit to SACO states that you were "agitated and distressed" and "under a lot of stress" due to family problems. Further, at that time you disclosed the use of illegal drugs. You were advised to "be honest" with SSGT C, and told to return on the following day for further evaluation and counseling. Upon returning to SACO on 24 December 1997, you were interviewed by Gunnery Sergeants (GYSGT; E-7) B and C. The medical record entry of that date states that you "disclosed again, illegal use of drugs. (You) admitted use of marijuana and valium within the previous two weeks." The entry reflects that after this admission, you became agitated and profane, and "started denying that (you) had admitted to illegal drug use." There is nothing in the record to reflect that you were advised of the right to remain silent under Article 31 of the Uniform Code of Military Justice (UCMJ). Subsequently, GYSGTs B and C signed a joint statement to the effect that you admitted to using illegal drugs during the interview of 24 December 1997 and, when pressed for specifics, stated "I used marijuana last weekend and valiums two weekends ago."

On 29 December 1997 you voluntarily submitted a urine sample which tested negative for drug use at the NDSL. On 8 January 1998 GYSGT B completed a Substance Abuse Evaluation, the first part of MCRD Form 5355/19, in which he recommended your separation from the Marine Corps. The second part of that form, Medical Officer's Evaluation, was completed and signed by a Lieutenant Commander (LCDR; O-4) L, who concluded that you were not drug or alcohol dependent, but would benefit from stress reduction. On or about 20 January 1998 you signed a service record entry which stated that you had been counseled concerning the disclosure of illegal drug use, told that separation processing was mandatory, and advised that assistance was available from a number of sources. You elected not to submit a rebuttal to the entry.

On 22 January 1998 the commanding officer (CO) initiated administrative separation action. The CO's letter of that date to you stated, in part, as follows:

1. You are hereby notified that I intend to recommend to the Commanding General (CG) that you be discharged from the U.S. Marine Corps per paragraph 6210.5 of (the Marine Corps Separation and Retirement Manual [MARCORSEPMAN]) by reason of misconduct, specifically drug abuse.

2. The factual basis for this recommendation is your voluntary disclosure of illegal drug use . . .

On that same day, you elected to be represented by military counsel and to present your case to an administrative discharge board (ADB). Subsequently, a Captain (CAPT; O-3) H was appointed to represent you. On 28 January 1998 the CO forwarded the case,

recommending discharge under other than honorable conditions (UOTHC).

On 16 March 1998 you received nonjudicial punishment for violation of a regulation by being out of bounds and sleeping on post under the influence of alcohol, in violation of UCMJ Articles 92 and 113, respectively. Punishment extended to a forfeiture of pay, restriction and extra duties.

Your ADB convened on 6 May 1998 and at the outset of the proceedings, documentary evidence was admitted without objection. Specifically, CAPT H introduced a letter from you to the CO in which you voluntarily consented to provide a urine sample. Your signature and that of a witness on that letter appear to be dated 29 December 1997. CAPT H also introduced letters from your mother and father stating that you were under a great deal of stress in December 1997 due to an imminent reunion with your father, with whom you had not had any meaningful contact since 1985. Both parents opined that this stress caused you to falsely admit that you had used drugs.

At the ADB, the recorder called SSGT C as a witness, who testified, in part, as follows:

. . . (You work) for me and have . . . since 1997 . . .

. . . On December 12th, I had suspected that (you were) using a prescription drug. I thought he was using Valium or some other drug because his speech was slow, his mouth was dry and his actions were slow. I called him outside and asked him if he had been using drugs. At that time, he said no. We talked some about what was going on with him and that was the end of the conversation.

On 23 December, GYSGT C called me from SACO . . . I asked him if I could speak with him regarding one of my Marines that I thought had been using Valium or something. He told me to send the Marine down and he would talk with him. I sent (you) down on the 23rd. I received a call later that day from GYSGT (C) regarding (you). He asked me to speak with (you) when he returned to the office, to listen to him, but not to judge him. I thought he was referring to some annual leave that (you) wanted.

I spoke with (you) when he returned from SACO. No one in the chain of command knew that I had referred him to SACO. I do not recall when I let the master sergeant or captain know. I did not send (you) to the SACO in an official manner or capacity.

(You) and I spoke for half an hour. He stated that he was stressed and becoming unglued. He then stated that the conversation that we had earlier concerning drugs and drug

use was true. I took that to mean that he was using some kind of drugs.

I suspected that he might be using a prescription drug, illegally. His first response was that he was not. I thought about it for a couple of weeks. The questionable behavior stopped. Once (you) returned from seeing GYSGT (C), (you) told me that my initial feelings were correct. I did not get any info regarding drugs from the Gunny until the next day, after (your) second visit. GYSGTs (C) and (B) informed me at that time that (you) had admitted to illegal drug abuse and would have to be processed for separation. The counselors said that he admitted using marijuana. I believe he used Valiums or some similar drug because of his behavior and admission . . .

(You) took a urinalysis on the 24th of December, a week or so after my suspicions. I spoke with him on the 16th and he took the urinalysis on the 24th.

On cross-examination, SSGT C stated that "I felt he was fit for duty when I sent him to SACO."

In his testimony, the urinalysis coordinator confirmed that you took a voluntary urinalysis and further said, "I did not receive a verification of a positive urinalysis in his case." He also noted that a urinalysis does not test for Valium.

Petitioner then testified under oath, in part, as follows:

(SSGT C) on the 23rd. I was quiet, thinking about my father who I had not seen in a number of years. I was apprehensive about seeing him . . . I was unsure of my feelings . . . I had picked my father up at the airport a couple of days prior.

I was depressed that day (and) I was also ineffective at work. I tried to speak with (SSGT C). I did speak with the SACO counselor. I wanted to go to the SACO to speak with someone about my problems. When I first went to SACO, I spoke with GYSGT (C). I told him about my situation with my father and my feelings. He disregarded that part of the conversation and started asking about the drugs I was using. . .

I admitted to drug use when GYSGTs (B) and (C) were in the room. I admitted to using marijuana and Valium. I said that because that was what they wanted to hear. I thought it was a stupid question. I thought if I admitted to the drug use, I would be allowed to talk about my real problems. I did know the ramifications of what I said. After they told me what would happen, I admitted that I had lied and tried to explain why. They submitted a report

that I denied using the drugs. I refused to sign a paper that I used drugs.

You also stated that "I submitted to a voluntary urinalysis. I tested negative for drugs," and concluded his testimony on direct examination by stating that "I have never used drugs."

On cross-examination, Petitioner testified as follows:

Prior to the 23rd, I had normal conversations with (SSGT C). I recently spoke with her regarding my feelings about my father. On the 23rd when I attempted to speak with (SSGT C) about my father, she asked me what drugs I was using.

My father visited a week prior to Christmas, before my visit to SACO on the 23rd. I had visited SACO before and had spoken with GYSGTS (B) and (Ca) on other issues. When they told me my career was over, I thought they were leading me into something I did not do. They thought I was using drugs.

(SSGT C) had accused me of being on Valium, but the marijuana was something that just popped into my head. They asked me what drugs I was using, so I mentioned those two.

. . . I was under stress when I said I used drugs. The counselors were not trying to help me. They were interrogating me. I could not talk to them. SACO stands for Substance Abuse Counseling Office. During my other meetings with SACO counselors, I discussed alcohol abuse.

When questioned by the members of the ADB you stated, in part, as follows:

The first time I went to SACO, I told him about my problems and started crying. He then asked me if I was using drugs. I told him I was guilty and he did not say anything else except that we would continue this tomorrow. If I asked you if you were using drugs and you replied "I'm guilty," I would think you used drugs.

When I told the SACO that I was guilty, I am not sure what I meant. I was overly emotional. I am unsure of what I was saying. I was trying to talk to someone about my problems . . .

I remember speaking with (SSGT C) about her suspicions regarding my drug use. She accused me of being on something. I told her I was not using drugs.

After I returned from SACO, I spoke with (SSGT C). I told her that I had admitted to using drugs. I did not speak

with her about anything else. I became emotional with her also. I told her that I did not use drugs and I said that because I thought it was what she wanted to hear.

At that point, SSGT C was recalled and she testified, in part, as follows:

. . . I do not recall (you) telling me that he had told SACO that he used drugs. I remember him saying that what he and I had discussed about a week ago was so. I did not ask him to clarify that statement. I took that to mean that he was using Valium or something. I knew he had spoken with GYSGT (C) and told him that he had used some drug. His tone was one of resignation and that he was reporting to me because he had been told to.

Initially, he did not tell me that what he had admitted was not true. Later on, approximately a month or so later he stated that he thought I was responsible for him going to SACO and being in this situation. He inferred that he did not use drugs.

On the 24th, (you) told me that what I thought was so. Later, in January when we were speaking on a different issue he made the statement that he did not use drugs. At that point, I stopped the conversation.

. . . I still feel he is using drugs. My suspicions were based upon observing him for a series of days and weeks . . . I spoke with (you) to let him know that I had noticed changes in his behavior . . .

. . . I am in his direct chain of command . . . I did not view (you) as being stressed. I know my Marines. I asked him about drug use because of his behavior and mannerisms. I do not claim to be the duty expert on drug use or abuse. I have been around family members that misused Valiums and other drugs.

It was my decision not to take my suspicions up the chain of command. I had no proof of drug use. I had only my suspicions. (You have) told me about his family problems and has a lot of issues. I was aware that he was attempting to resolve some issues with his father whom he had not seen in several years.

. . . I expect (SACO) counselors to be trained to help Marines and talk with them about their problems. I am not aware that they work in the capacity of gathering evidence. I am not clear on what counselor/client relationships are at the SACO. I do not (know) what the rules are regarding confidentiality. When I sent (you) to SACO, I did not consider it official.

SSGT C also once again stated that you submitted a urine sample on 24 December 1997 which later tested negative. She also testified that you had been involved in several alcohol-related incidents.

When recalled as a witness, you testified that you were trying to get help for the alcohol problem.

After the recorder and CAPT H made final arguments, the ADB was closed for deliberations. After less than an hour, the ADB found that a preponderance of the evidence showed that you had committed misconduct due to drug abuse, and recommended discharge UOTHC. However, the ADB also recommended that the discharge be suspended for a probationary period.

On 10 July 1998 the case was reviewed by the servicing staff judge advocate, who found the proceedings legally sufficient and recommended discharge UOTHC without suspension. On that same day the CG concurred with this recommendation and directed separation UOTHC by reason of misconduct due to drug abuse. Accordingly, you were so discharged on 3 August 1998 after about two years of active service.

The Board first considered your contentions that you were not guilty of misconduct due to drug abuse as alleged, and that the ADB failed to properly apply the burden of proof or weigh the evidence. Since the ADB is the primary fact-finder in the administrative separation process, and is responsible for judging the credibility of witnesses and weighing the evidence, its decisions should not be overturned unless it is clearly wrong. Additionally, the government is not required to prove its case beyond a reasonable doubt, but need only show that the allegations are supported by a preponderance of the evidence.

The Board believed that your ADB could reasonably conclude that you were truthful when you admitted using marijuana and valium to GYSCTS B and C. The affidavit from the NDSL's Technical Director indicates that your urine sample was submitted on 29 December 1997, and not 24 December 1997 and, therefore, the ensuing negative urinalysis does not bolster your claim of innocence. Concerning the credibility of SSGT C, the Board concluded that although she might have handled some facets of your case differently, this does not render her unworthy of belief. Finally, you have submitted no new evidence not considered by the ADB. Accordingly, the Board concluded that your contentions are without merit.

The Board also rejected your assertion that the Marine Corps failed to provide you with adequate notification of the separation processing. Paragraph 6303.3a(1) of Marine Corps Order (MCO) P1900.16E, the MARCORSEPMAN, states that the letter of notification should set forth the specific reasons for separation forming the basis for separation, including the circumstances upon which the action is based and a reference to

the applicable section of the MARCORSEPMAN. The letter of notification to you of 2 January 1998 complied with these requirements. Even if the letter erroneously stated the factual basis as "your voluntary disclosure of illegal drugs," instead of "your use of illegal drugs as shown by your voluntary disclosure," the Board concluded that such an error did not render the notice legally inadequate. A notification that reasonably apprises an individual of the matters at issue satisfies due process unless the person is misled. *Savina Home Industries, Inc. v. Secretary of Labor*, 594 F.2d 1358, 1365 (10th Cir. 1979); *Chicago Cable Communications v. Chicago Cable Commission*, 879 F.2d 1540, 1545-46 (7th Cir. 1989). It is clear from the record that you were not misled. Additionally, since you did not object to the notification letter at the ADB, you waived any right to subsequently raise this issue. *Snakenberg v. United States*, 15 Cl.Ct. 809, 813 (1988).

The Board also found no merit in your assertion that the Marine Corps failed to follow applicable directives by processing you for separation when the allegation of drug abuse was never confirmed. Paragraph 6210.5b of the MARCORSEPMAN does state that Marines who are "confirmed as having used or possessed illegal drugs will be processed for separation . . ." Paragraph 1208.1a of MCO P5300.12A, the Marine Corps Substance Abuse Program, states that "an incident of drug abuse is 'confirmed' if the commander determines that a preponderance of the evidence has established that the Marine has wrongfully used . . . a controlled substance . . ." Paragraph 2 of Figure 1-1 of the directive sets forth an example of the service record entry to be made upon such confirmation, and it is consistent with the page 11 entry in your record. Accordingly, it is clear that the CO confirmed your illegal drug use, and properly initiated separation processing.

The Board also rejected the contention that it was improper to characterize your service as under other than honorable conditions given paragraph 6210.5c of the MARCORSEPMAN. This paragraph states that a Marine's voluntary submission to a Department of Defense program of treatment and rehabilitation for drug abuse, and evidence disclosed during such a program may not be used against the Marine on the issue of characterization. However, you were never enrolled in such a program, and the Board did not believe that the referral to SACO was the functional equivalent of such a program, especially since you did not volunteer for counseling but were ordered to go by SSGT C.

The Board also concluded that you have not shown that the medical evaluation of 8 January 1998 was improperly performed. Contrary to your contention, this part of the MCRD Form 5355/19 was completed by LCDR L, who apparently was a medical officer. You have not submitted any evidence or referenced any directive to support your assertion that the form was completed in an untimely manner or, if it was, how such an error would have prejudiced you.

The Board finds no merit in your assertion that you were denied due process because you were not permitted to confront and cross examine GYSGTs B and C. *Milas v. United States*, 42 Fed.Cl. 704, 716-17 (1999); *Weaver v. United States*, No. 99-179C (Fed.Cl. Feb. 7, 1999). Additionally, that paragraph 6316.1 of the MARCORSEPMAN states that the rules of evidence governing trials by court-martial are not applicable at an ADB. Accordingly, the written statement of the GYSGTs was properly admitted. Further, your counsel, CAPT H, could have requested the presence of these individuals at the ADB in accordance with paragraph 6317 of the MARCORSEPMAN, but declined to do so.

The Board also rejected your contention that you did not receive effective assistance of counsel from CAPT H. In this regard, the Board first noted that a servicemember is guaranteed effective assistance of counsel at a court-martial not only by the Sixth Amendment but also UCMJ Article 27(b), which states that defense counsel detailed at a general court-martial must be "certified as competent." *United States v. Marshall*, 45 M.J. 268, 270 (1996). Paragraphs 6304.3b and 6002.6 of the MARCORSEPMAN make this guarantee applicable to an ADB respondent by stating that such an individual is entitled to "qualified counsel," and defining that term as "counsel qualified under Article 27(b) of the UCMJ." A two-part test must be met in order to prevail on a claim of ineffective assistance of counsel--the performance of the lawyer must be deficient and the client must be prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *United States v. Polk*, 32 M.J. 150, 153 (CMA 1991). The deficient performance prong of this test requires that the lawyer's errors be so serious that he was not functioning as counsel. *Strickland*, at 687. Investigation is an essential part of the adversary process, and counsel has a duty to investigate or make reasonable decisions that make investigation unnecessary. *Wade v. Armontrout*, 798 F.2d 304 (8th Cir. 1986). However, a strong presumption exists that counsel is competent. An individual must rebut that presumption by pointing to specific errors by counsel which were unreasonable under prevailing professional norms. *United States v. Cronin*, 466 U.S. 648 (1984). The prejudice part of the test requires a showing that counsel's errors were sufficiently serious to deprive the client of a fair and reliable hearing. *Strickland*, at 690. *United States v. Scott*, 24 M.J. 186, 188 (CMA 1987). One must show that "a reasonable probability exists that but for counsel's errors, the result of the proceeding would have been different." A probability is reasonable only if it is "sufficient to undermine confidence in the outcome." *Strickland*, at 694.

After carefully considering your contentions of ineffective assistance of counsel and the affidavit of CAPT H, the Board concluded that his assistance to you was not ineffective. The Board was unable to find that he committed any procedural or substantive errors. To the extent that your version of events

differs from that of CAPT H, the Board concluded that he was more credible and worthy of belief.

The Board finally considered but rejected your assertion that SSGT C and GYSGT's B and C were derelict in the performance of their duties in various respects, especially their failure to advise you of your right to remain silent in accordance with UCMJ Article 31. Even if such advice should have been given, your inculpatory statements would have been admissible at the ADB, since the exclusionary rule does not apply at such a proceeding. *Garrett v. Lehman*, 751 F.2d 997, 1002-03 (9th Cir. 1985). This principle has been applied to Article 31 violations. *Kindred v. United States*, 41 Fed.Cl. 106 (1998); *Varn v. United States*, 13 Cl.Ct. 391, 396 (1987); *Phillips v. Perry*, 883 F.Supp. 539, 547 (W.D.Wash. 1995). This rule is reflected in the previously cited MARCORSEPMAN paragraph 6316.1

Accordingly, your application has been denied. The names and votes of the members of the panel will be furnished upon request.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence or other matter not previously considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of a probable material error or injustice.

Sincerely,

W. DEAN PFEIFFER
Executive Director

Enclosures

Copy to: Mr. Edward R. Torrence, Attorney at Law